excluded him from participation in their conference on the case, and with having denied him an inspection or any knowledge of their opinion until after it was handed down. After thus paying his respects to his brother judges, the dissenting judge proceeds, in vigorous fashion, and in an opinion which would occupy more than twenty-five of our pages, to combat the legal position of the majority, and the ethical attitude of the Regents.

Brannon, P., spoke for the majority in an opinion only half as volumnious as that of the opposition; but this he supplements with two additional opinions by himself; so that while the dissenting judge wins if the count be taken by pages, the majority have him on the hip if the result depends on the number of opinions or the reckoning of noses.

The West Virginia Court has many times brought itself and the State into disrepute by its unjudicial behavior, but we doubt if a more unseemly spectacle was ever enacted in the juridical annals of America, than that presented in this case.

The *West Virginia Bar* vigorously assails the action of the majority in excluding one of the judges from their conference on the case, and declares that "When the court handed down an opinion as the opinion of the court, in which the court as a body had no opportunity to concur or dissent, they imposed upon the public, and laid themselves open to impeachment for malfeasance in office."

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EQUITY PRACTICE—ANSWER OF CORPORATION, SWORN TO BY OFFICER WHO IS NOT A PARTY—EFFECT AS EVIDENCE.—On a bill in equity against a corporation for discovery and account, the answer of the defendant corporation was verified by the oath of one of its officers on his personal knowledge. *Held*, That the defendant is entitled to the benefit of the equity rule that a responsive and verified answer is evidence, only to be overcome by the testimony of two witnesses or its equivalent—*Kane* v. *Schylkill Fire Ins. Co.* (Pa.), 48 Atl. 989.

It is well settled that an answer of a corporation under its corporate seal merely, is not evidence, but mere pleading. *B. & O. R. Co.* v. *Wheeling*, 13 Gratt. 62; *Roanoke St. R. Co.* v. *Hicks*, 96 Va. 510; *Union Bank* v. *Geary*, 5 Pet. 99; *Lovell* v. *S. S. Mill Ass'n*, 6 Paige, 54. Hence, as held in *Roanoke St. R. Co.* v. *Hicks* (*supra*), a bill of discovery cannot be maintained against a corporation, unless one of its officers, supposed to be personally cognizant of the facts as to which discovery is sought, be made a co-defendant, and required to answer under oath.

The latter case is not authority, however, for the principle that if the defendant, instead of demurring, had voluntarily answered, under the oath of one of its officers familiar with the facts, as in the principal case, such answer would not have been accorded the same weight as the verified answer of an individual defendant.

The precise question decided in the principal case—namely, the effect of an answer by a corporation, sworn to by an officer as of his personal knowledge, though himself not a party defendant, seems seldom to have arisen. On principle, the decision in the principal case seems to be sound. It has the sanction of a previous Pennsylvania case (*Waller* v. *Coal Co.*, 191 Pa. 193, 43 Atl. 235), and of the Supreme Court of the United States. *Carpenter* v. *Insurance Co.*, 4 How. 219.

If the oath of an officer who is made a party defendant, not because of his interest in the suit, but merely for purposes of discovery, entitles the answer to the benefit of the usual equity rule, no reason is perceived why a similar oath by an

officer not made a party, is not of equal weight as an instrument of evidence. The object of making the officer a party is, of course, to compel him to answer—but if he makes the necessary disclosure under oath, without compulsion, this should not affect the evidentiary character of the answer.

It may be objected to this that when the plaintiff makes the officer a party defendant, and calls for discovery, he thereby accredits his veracity, and agrees to accept his answer as evidence. As shown, however, in *Thornton* v. *Gordon*, 2 Rob. (Va.) 721, this is not the foundation of the rule under which an answer in chancery is made an instrument of evidence, though so suggested by Judge Story (2 Story, Eq. Jurisp. 1528); for if such were the reason, the plaintiff might disclaim confidence in the defendant, and, by waiving oath, or discovery, deprive the answer of its evidentiary value under the equity rule. But the Supreme Court of Appeals in this State has in several cases distinctly repudiated this reasoning, and held that, in the absence of statute, the plaintiff cannot deprive the defendant of the advantage of his sworn answer by waiving oath or disclaiming discovery; that the rule making the sworn answer evidence, is a rule of the forum, by which all parties are bound who invoke the jurisdiction of equity. *Thornton* v. *Gordon* (*supra*); *Jones* v. *Abraham*, 75 Va. 466.

There is a singular dearth of authority, or of discussion in the text books, on the precise question involved in the principal case. We have examined Thompson, Morawetz, Clark, Taylor and Elliott, on Corporations, Dillon on Municipal Corporations, Story's Equity Pleading, Daniell's Chancery Practice, Barton's Chancery Practice, Merwin's Equity and Equity Pleading, Shipman's Equity Pleading, the various Digests (including the Century), without finding discussion or authority. In 1 Enc. Pl. & Pr. 956–957, two cases are cited on the point—namely, *Carpenter* v. *Insurance Company* (*supra*), and *Van Wyck* v. *Norvell*, 2 Humph. (Tenn.) 192—the latter apparently *contra*.

The following extract from the opinion of Mitchell, J., in the principal case, seems to justify the conclusion reached, and to establish on a sound basis the right of a corporation to demand that its responsive answer in chancery, verified by the oath of one of its officers personally cognizant of the facts, though not a party defendant, shall be treated as of equal evidentiary value with the sworn answer of an individual:

"The important question in this case, by which all the others are more or less affected, is whether an answer in equity of a corporation, sworn to by an officer on his personal knowledge, is entitled to the benefit of the equity rule that a responsive answer is evidence only to be overcome by the testimony of two witnesses, or of one witness with corroborating circumstances, or whether it is to be regarded as mere pleading.

"The precise origin of the rule has been the subject of difference of opinion among text writers, as is shown by the learned referee in this case. But the reason for it is fairly apparent. Cases in equity are those in which the law affords no adequate remedy. They are therefore exceptional, and, before a party should be granted exceptional and extra-legal relief, his case should be established clearly. In issues at law all cases are clear, in theory. If there is witness against witness, and oath against oath, the jury decides which to believe, and finds a verdict for one party or the other. There is no room for doubt. But in equity, if there is oath against oath, ordinarily on paper, by depositions or testimony before an

examiner, the matter, as the early expression was, is *in equilibrio*, and there is no clear case for the chancellor to act upon. The complainant, having the burden of proof, must fail. But, whatever its origin, the rule is settled, and is a part of universal equity practice. The respondent is brought into court without his consent, and put to compulsory answer and disclosure of his knowledge on the subject of the suit for the benefit of his adversary. By the action of the plaintiff the testimony of defendant is thus made evidence, and it is only proper and just that, if the plaintiff does not find it all in his favor, he should be required to overcome it by a preponderance of evidence to the contrary.

"No sufficient reason has been presented why a corporation should not be entitled to the protection of the rule. It is said that a corporation cannot answer under oath, but only under seal. This is conceded, but it is purely technical. A corporation can only act through the persons of its officers or other agents. Its corporate seal is not action, but only evidence of action by the proper officers. When, therefore, to the answer under seal there is added the oath of an officer on his own knowledge, the whole becomes a corporate act, with all the advantages to the plaintiff of compulsory disclosure of the truth which he would have had in a suit against an individual, and he should take such advantages in the same manner, *cum onere*.

"The point has not been much discussed in Pennsylvania, but the opinion of this court was indicated by the late Chief Justice Sterrett in *Riegel* v. *Insurance Co.*, 153 Pa. 134, 143, 25 Atl. 1070; and in *Waller* v. *Coal Co.*, 191 Pa. 193, 202, 203, 43 Atl. 235, an express ruling in accordance with our present views was made by the court below, and necessarily by this court in affirming the decree on his opinion.

"The learned referee was of opinion that 'the very great weight of American authority is contrary to the view' of appellant, but the authorities do not sustain him. If we take out of the list of citations those which deal with answers under corporate seal only, there is no uniformity shown; and in the weightiest authority, the Supreme Court of the United States, the practice is settled in accordance with our views. *Carpenter* v. *Insurance Co.*, 4 How, 219, 11 L. Ed. 931. We are therefore of opinion that the ruling of the referee was erroneous, and the tenth assignment must be sustained."

By Va. Code, sec. 3281 (Acts 1893–4, p. 15), the plaintiff may in his bill waive an answer under oath, in which case, the answer is mere pleading. *Millhizer* v. *McKinley*, 6 Va. Law Reg. 309.